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Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel
1-5 April 2002

Draft report

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I. Introduction

1. The Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel was established by the General Assembly in paragraph 7 of its resolution 56/89 of 12 December 2001, to consider the recommendations made by the Secretary-General in his report on measures to strengthen and enhance the protective legal regime for United Nations and associated personnel (A/55/637). Pursuant to paragraph 9 of the same resolution, the Ad Hoc Committee met at United Nations Headquarters from 1 to 5 April 2002.[1]

2. In accordance with paragraph 7 of resolution 56/89, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. In addition, pursuant to paragraph 8, the Secretary-General invited the International Committee of the Red Cross to participate as an observer in the deliberations of the Ad Hoc Committee.

3. On behalf of the Secretary-General, the Legal Counsel of the United Nations, Hans Corell, opened the session of the Ad Hoc Committee.

4. At its 1st plenary meeting, on 1 April 2002, the Ad Hoc Committee elected the members of its Bureau, as follows:

Chairman:
H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan)

Vice-Chairpersons:
Elena Geddis (New Zealand)
Ioana Gabriela Stancu (Romania)
Marcelo Vazquez (Ecuador)

Rapporteur:
Daniel Kipkemei Kottut (Kenya)

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5. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee. Mannoush H. Arsanjani, Deputy Director of the Division, acted as Deputy Secretary of the Ad Hoc Committee and Secretary to its Working Group of the Whole. The Codification Division provided the substantive services for the Ad Hoc Committee and its Working Group.

6. At the 1st plenary meeting, the Ad Hoc Committee adopted the following agenda (A/AC.264/L.1):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of the recommendations made by the Secretary-General in his report (A/55/637) on measures to strengthen and enhance the protective legal regime for United Nations and associated personnel.
6. Adoption of the report.

7. In accordance with paragraph 7 of General Assembly resolution 56/89, the task of the Ad Hoc Committee was to consider the recommendations made by the Secretary-General in his report on measures to strengthen and enhance the protective legal regime for United Nations and associated personnel. The report entitled "Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel", is contained in document A/55/637. The Committee also had before it a Chairman's discussion paper (A/AC.264/L.2) entitled "Issues raised in connection with the recommendations contained in the Secretary-General's report (A/55/637)" (reproduced in the annex to the present report), as well as resolution 56/89 and General Assembly resolution 49/59 of 9 December 1994, the annex to which contains the text of the 1994 Convention on the Safety of United Nations and Associated Personnel.

II. Proceedings

8. At its 1st plenary meeting, the Ad Hoc Committee adopted its programme of work and decided to continue its deliberations in the context of a Working Group of the Whole. The Working Group held five meetings, from 1 to 3 April. At its 2nd plenary meeting, on 5 April 2002, the Committee adopted its report.

9. At the 1st meeting of the Working Group, also on 1 April, delegates were briefed by representatives of the Office of the United Nations Security Coordinator, the Office for the Coordination of Humanitarian Affairs, the Office of the United Nations High Commissioner for Refugees and the Office of Legal Affairs on recent developments and practical and legal issues encountered by the United Nations in ensuring the safety and security of its personnel. The briefing was followed by a question-and-answer session.

III. Discussions in the Working Group: Consideration of the Secretary-General's recommendations in document A/55/637

Short-term measures

1. Incorporation of key provisions from the 1994 Convention in the status-of-forces or status-of-mission agreements concluded between the United Nations and States in whose territories peacekeeping operations are deployed as well as in host country agreements

10. There was general support for the Secretary-General's recommendation to include key provisions of the 1994 Convention on the Safety of United Nations and Associated Personnel into status-of-forces agreements (SOFAs), status-of-mission agreements (SOMAs) and in host country agreements. A number of delegations stressed the importance of this measure, and its effective implementation.

11. Several delegations expressed their surprise and disappointment upon learning from the briefing given by officials from the Secretariat that so far no steps have been taken by the Secretary-General to reflect the key provision of the 1994 Convention in existing SOFAs, SOMAs or host country agreements.

12. A number of delegations noted that the legal basis for the implementation of steps by the Secretary-General to incorporate key provisions of the 1994 Convention into SOFAs, SOMAs or host country agreements already existed, and was reflected in various General Assembly resolutions, including resolution 56/89 and resolution 56/217 of 21 December 2001, as well as Security Council presidential statements. The suggestion was made that nevertheless a new express endorsement and clear reiteration of the recommendation by the Secretary-General to incorporate the key provisions of the 1994 Convention into SOFAs, SOMAs and host country agreements could be formulated in a resolution by the General Assembly.

13. The view was expressed that guidance should be provided on the most relevant provisions of the Convention that should be included in SOFAs, SOMAs and host country agreements. Many delegations suggested that in addition to the key provisions reflected in paragraph 24 of the Secretary-General's report, other key provisions of the Convention which should be incorporated were, in particular, articles 6 and 8. The proposal was also made to incorporate article 12 (1) of the Convention into SOFAs, SOMAs and host country agreements.

14. Some delegations suggested drafting changes to the proposed text in paragraph 24 of the Secretary General's report.[2]

15. It was noted, however, that careful consideration needed to be given to the text proposed in paragraph 24, as it did not mirror accurately all the corresponding provisions of the Convention. It was also observed that careful consideration should be given to which provisions of the Convention should be incorporated, given that there existed an important balance among the provisions of the Convention.

16. The view was expressed that it was important to urge host countries to agree to the incorporation of key provisions of the Convention in SOFAs, SOMAs and host country agreements, as well as to encourage host countries to accede to the 1994 Convention.

17. A number of delegations supported the suggestion to request the Secretary-General to initiate an amendment procedure in order to include the provisions of the Convention in existing SOFAs, SOMAs and host country agreements.

18. Some delegations noted that there was often considerable delay in the conclusion of SOFAs, SOMAs and host country agreements. They considered that it was important to stress the early conclusion of such agreements. It was also suggested that until such time as the relevant agreement was concluded between the United Nations and the host country, interim rules should be used which incorporated the key provisions of the 1994 Convention. Delegations also supported the updating of the existing model agreements for SOFAs, SOMAs and host country agreements to incorporate the key provisions of the 1994 Convention.

19. Several delegations favoured the establishment of an appropriate follow-up mechanism requesting the Secretary-General to report to the General Assembly on steps undertaken to incorporate the key provisions of the Convention into SOFAs, SOMAs and host country agreements.

20. Some delegations, however, emphasized the short-term and limited nature of the above recommendation. It was observed also that the recommendation could be an interim measure pending the conclusion of a Protocol. On the other hand, some other delegations viewed the measure not merely as a short-term solution but as an effective way of ensuring the implementation of the Convention on a larger group of States, including those that have not yet ratified or acceded to the Convention as well as enlarging the scope of the Convention, to include a larger category of United Nations operations.

2. Devising a procedure for initiating a declaration of an exceptional risk to the safety of United Nations and associated personnel

21. There was general agreement that the Secretary-General already had the authority to initiate the adoption of a declaration by the General Assembly or the Security Council for characterizing a particular United Nations operation as involving an exceptional risk. There was therefore no need for any formal action by the Ad Hoc Committee to that effect. There were no legal or practical obstacles that would prevent the Secretary-General in the exercise of this authority. Indeed it was noted that, as the chief administrative officer of the Organization, he had the duty to initiate a "declaration" in the relevant bodies whenever he deemed it appropriate. Some delegations expressed concern that the Secretary-General, so far, had not exercised that authority.

22. Several delegations observed that the measure proposed by the Secretary-General in his recommendation was provisional since it did not eliminate the "trigger mechanism" for the application of the Convention contained in the requirement for a "declaration". Such a requirement was considered artificial, discriminatory and impractical, especially in the light of the deployment of United Nations operations in volatile and unpredictable environments. In addition, it was noted that it was necessary to be realistic in expecting the Secretary-General to initiate a "declaration" given the sensitive political nature of such a "declaration" and the possible negative consequences that a "declaration" might have on host countries. Therefore, as a long-term measure, they favoured the elimination of such a requirement in the Convention.

23. With regard to a resolution confirming the authority of the Secretary-General to initiate a "declaration" in the General Assembly or the Security Council, some delegations did not see any need for such a resolution, which would only confirm the authority that the Secretary-General already had. Other delegations were prepared to view it as an expression of political support for the Secretary-General to take such initiatives. It was generally agreed that the text of any resolution to that effect should be carefully drafted. It should not preclude other options to initiate such a declaration, for example by a Member State, the President of the Security Council or the President of the General Assembly. It was also noted that the role of the Security Council as the primary United Nations organ authorized to determine the existence of any threat to the peace or breach of the peace should not be affected.

24. A number of delegations did not find it prudent to devise a formalized and standard procedure for initiating the consideration and adoption of a declaration which would reduce the Secretary-General's flexibility in exercising his authority. It was stated that the Secretary-General should exercise his judgement in determining the methods and the timing for such action. Several suggestions were made in that regard. It was proposed that the Secretary-General should seek advice from the appropriate agencies and possibly from States contributing forces. The suggestion was also made that it would be worthwhile to explore any linkage between the timing for initiating a "declaration" by the Secretary-General and an internal mechanism used by the United Nations Security Coordinator for the categorization of phases of security risk for United Nations personnel. The concern was expressed, however, that the use of such categorization for the purposes of initiating a "declaration" could negatively affect the work of the Security Coordinator, in particular its depoliticized and independent approach to identifying the phases of security risk for United Nations and associated personnel.

Other measures

General statements with respect to the recommendations calling for amendments to the Convention

25. There was general agreement in the Ad Hoc Committee that all efforts should be made to strengthen the protection of the United Nations and associated personnel involved in any United Nations operation. There was also general agreement that the report of the Secretary-General raised very important issues which deserved serious consideration. A number of delegations expressed the wish to have more time to reflect on those important issues and their implications and to continue their consideration at future meetings. At the current preliminary stage of the considerations, however, the views of delegations differed with regard to resolving the problems with the Convention through a Protocol.

26. While supporting short-term measures proposed by the Secretary-General to strengthen the existing regime of the Convention which did not require any amendment, several delegations noted the limitations of those measures and called for steps to be taken to correct serious flaws in the Convention. In particular they noted that the need for a "declaration" and the discriminatory nature of the scope of the Convention should be re-examined in the light of more recent United Nations operations.

27. Several other delegations, however, were of the view that the potential utility of the Convention had not yet been tested and it was likely that any shortcomings in the Convention could be rectified by short-term measures which did not require an amendment to the Convention. The priority for those delegations was to make every effort to encourage universal adherence to the Convention and they felt that any efforts at the current stage to amend the Convention could discourage further ratifications. A suggestion was made that even if the Ad Hoc Committee recommended the extension of the scope of the Convention by a Protocol, such a Protocol should be free-standing and independent of the 1994 Convention.

28. While recognizing the importance of universal adherence to the Convention, especially by host countries, several delegations expressed the view that it would be necessary to examine the reasons that prevented States from adhering to the Convention. In that regard, reference was made to a review mechanism envisaged in article 23 of the Convention. It was also suggested that the Secretary-General should circulate to all States a questionnaire requesting information about their implementation of the Convention, the reasons for their non-adherence to the Convention as well as their views on strengthening the Convention and on the status and content of a Protocol.

29. Support was expressed for the suggestion that the Ad Hoc Committee should focus on ways to strengthen the existing regime. It was noted that amending the Convention was neither urgent nor indispensable. As an example of the efficiency of practical measures to enhance the existing regime of the Convention, several delegations referred to the figures made available by the Secretariat to the delegations at the briefing indicating that the number of casualties had diminished recently due to training and other efforts by the Secretariat.

30. It was suggested that the Secretary-General should prepare another report in two or three years evaluating the effectiveness of the Convention in the light of the implementation of the short-term measures. This report should be used as the basis for determining what further steps were needed in connection with the Convention.

3. Designating the Secretary-General as the "certifying authority" for the purposes of attesting (a) to the fact and content of a declaration of an exceptional risk by the Security Council or the General Assembly, (b) to the fact and content of an agreement between a non-governmental organization and the United Nations, and (c) to the status of United Nations and associated personnel

31. Several delegations, in principle, supported the Secretary-General's recommendation, noting that while it did not require amending the Convention it eliminated certain shortcomings in the Convention and ensured its more efficient implementation. The suggestion was made to include the recommendation contained in paragraph 23 of the Secretary-General's report in a General Assembly resolution. Some delegations, however, were of the view that the recommendation should not be a priority issue in the work of the Ad Hoc Committee since it was not directly linked to the scope of the Convention and did not contribute to the enhancement of measures to ensure the safety and security of United Nations and associated personnel.

32. It was stressed that, within his mandate, the Secretary-General already had certifying authorities and there was no legal obstacle preventing him from exercising those authorities. While doubts were expressed as to the need for any

formal action by the Ad Hoc Committee with respect to the recommendation, some delegations were willing to express political support for the Secretary-General to exercise his certifying authorities within his mandate in a resolution to be adopted by the General Assembly at its next session.

33. Expressing flexibility with respect to the desirability of a resolution, some delegations urged its careful drafting. In particular, caution was voiced against any language in the resolution implying that the Secretary-General's certificate had a constitutive nature or would serve as a "trigger mechanism" for the application of the Convention. It was also noted that the certificates should be issued only upon request by a State.

34. It was further stated that a certifying authority of the Secretary-General should be limited to questions of fact and not of law. In that context, it was noted that it would be inappropriate to give the Secretary-General the authority to determine the status of the United Nations and associated personnel since that involved the interpretation of the 1994 Convention. Doubts were also expressed as to the desirability of a Secretary-General's certificate in the case of a "declaration of an exceptional risk" by the Security Council or the General Assembly, since in such a case the certificate would duplicate a document containing such a declaration. The view was also expressed that it would be beyond the Secretary-General's mandate to certify the status of certain personnel, such as the personnel of specialized agencies.

35. Concern was voiced with respect to the last sentence of paragraph 23 of the Secretary-General's report, in which States were called upon to accept certificates issued by the Secretary-General as proof of the facts attested therein. While recognizing that the Secretary-General might be in the best position to ascertain certain facts, it was underscored that certification by the Secretary-General could not have an automatic binding effect on national courts. Any such certification before a court would have to meet the requirements of the principle of legality as well as evidentiary and other requirements in a contentious case. Consequently national courts should determine the legal effects of such certificates. On the other hand, the view was expressed that the recommendation merited careful consideration since a binding certifying authority of the Secretary-General might be useful, especially during a prosecute-or-extradite procedure when the States concerned were in dispute.

4. Empowering the Secretary-General instead of or in addition to the Security Council and the General Assembly as competent to declare whether a particular operation involves an exceptional risk by amending the Convention

36. In general, delegations did not favour this recommendation, for a variety of reasons. Several delegations objected to the recommendation because it did not eliminate the shortcomings of the Convention. Other delegations objecting to the recommendation noted that it would raise new complex issues, in particular with regard to the overlap and conflict of jurisdictions between different United Nations organs, which in turn could make the mechanism of adopting a declaration more complicated. It was also stated that the Secretary-General could not replace the Security Council and the General Assembly in making such a declaration. Reiterating the political nature of a declaration and the negative consequences it could have for a host country, several delegations were of the view that the Security Council and the General Assembly, being political bodies, were in a better position

than a Secretary-General to make a "declaration". The general feeling was that the Secretary-General's authority to initiate a "declaration" in both bodies would suffice and there was no need to further expand the Secretary-General's authority in that regard.

37. A few delegations, however, were prepared to accept the recommendation as a short-term measure and until such time the Convention was amended and if the Secretary-General were to be given the authority in addition to and not instead of the General Assembly or the Security Council to make a declaration of an exceptional risk.

5. Extending the scope of the Convention to all United Nations operations by amending the Convention

38. Several delegations strongly supported this recommendation and expressed the view that it was at the heart of the points made in the Secretary-General's report and therefore at the centre of the considerations of the Ad Hoc Committee. While supporting the recommendation, they noted that the Convention had been drafted in response to attacks on peacekeepers when non-peacekeeping operations had been seen as secondary, while currently facts evidenced an increased deployment of non-peacekeeping operations in volatile situations, which had led to an increasing trend of attacks on United Nations staff of non-peacekeeping missions. Those delegations expressed concern that those staff were outside the automatic application of the Convention because of the shortfall of the scope of the Convention. It was underscored that there should be no distinction among United Nations personnel since all United Nations personnel were entitled to equal protection in all situations regardless of the level of risk. While that view was generally shared by the delegations, divergent views were expressed with respect to the ways to achieve it.

39. Several delegations stressed that the only adequate long-term solution to the problem was to remove the requirement for a "declaration" and apply the Convention automatically to all United Nations operations. In support of such a measure, they stated that the requirement for a declaration was not operational because it made a political assessment of the facts on the ground an element of the crime and in so doing politicized what should have been a question purely of criminal law. They also referred to other deficiencies of such a mechanism, like practical limitations in long-term humanitarian operations where the security situation might change over time. They further expressed concern that the declaration of risk requirement, in attempting to distinguish between United Nations operations in a way that it was not easily applied in fact or justified in principle, effectively created a discriminatory regime.

40. As to the way to remedy the shortfall, they suggested adopting a brief and focused instrument and using for such purpose the Secretary-General's report as the starting point. The suggestion was made to include the provision proposed in paragraph 30 of the Secretary-General's report in the Protocol. However, it was suggested that the language of the proposal should be studied further.

41. Some other delegations were of the opinion that the Convention did not necessarily have a narrow scope, but applied to United Nations operations under different conditions. In their view, the distinction between peacekeeping and non-peacekeeping operations was justifiable because it was rooted in the inherent characteristics of the two operations. They also disagreed with the argument that the

Convention made the requirement for a "declaration" an element of crime. Instead such requirement should be regarded as an element requiring the application of the treaty in a particular case.

42. It was further noted that the Convention was balanced and had been drafted taking account of the divergent views of States. They further noted that a Protocol amending the Convention could disturb that balance and increase the political and legal burden of the application and interpretation of the Convention. In response, it was stated that, once the idea of amending the Convention was supported, the concerns of delegations could be addressed and eliminated during the drafting and negotiations of the text of the Protocol.

43. The view was expressed that the problem was not in the Convention's provisions but in its implementation. In that connection, specific reference was made to the possibility of overcoming shortcomings of the Convention in SOFAs, SOMAs and host country agreements. Delegations reiterated their position that they did not regard that option as a short-term measure but rather as long-standing and the best practical solution to the effective implementation of the Convention, in particular with respect to host countries, non-parties to the Convention.

44. Other delegations reiterated, however, that the inclusion of the Convention's provisions in SOFAs, SOMAs and host country agreements would not address the problem because the bulk of the operations not automatically covered by the Convention would not be the subject of such agreements. The personnel of those operations would therefore not be helped by such short-term measures.

45. While expressing flexibility regarding the proposed amendments to the Convention, the view was also expressed that the consequences of such amendments and the possible appearance and application of different regimes should be further studied. It was also noted that the protective regime for United Nations personnel should be formulated without prejudice to the obligations of United Nations personnel to comply with local laws, traditions and customs.

6. Extending the scope of the Convention to include all United Nations and associated personnel, including the personnel of humanitarian non-governmental organizations, dispensing with the requirement of a "contractual" link between their organizations and the United Nations

46. There was general support for the principle that the protective regime under the Convention should cover all United Nations personnel, including the personnel of humanitarian non-governmental organizations working alongside and under some form of association with the United Nations. It was noted that while humanitarian non-governmental organizations not associated with the United Nations should also benefit from legal protection, such an endeavour fell outside the scope of the 1994 Convention and equally outside the mandate of the Ad Hoc Committee.

47. However, it was stated that personnel in association with the United Nations needed to be clearly defined and objectively recognizable. In addition, it had to be shown clearly that the activities of the non-governmental organization fell under the authority and control of the United Nations.

48. In the view of some delegations, the requirement to establish a link between non-governmental organizations and the United Nations need not always be through a contractual link. They endorsed the opinion of the Secretary-General as stated in

paragraph 15 of his report that "any contractual link or a treaty arrangement institutionalizing the cooperation between the United Nations and a non-governmental organization in support of a United Nations operation or in the implementation of its mandate, would meet the requirement of article 1 (b) (iii) of the Convention". In the opinion of those delegations, other, perhaps less onerous alternatives to a strict "contractual" link might satisfy the requirements of the Convention, given the practical difficulties encountered with that requirement. It was noted that some other eligibility criteria might be employed, including other forms of administrative and institutionalized links. The same delegations also noted that the link, in whatever form, should be clear and objectively observable. The view was also expressed that the proposed text in paragraph 33 of the Secretary-General's report provided a good basis for further discussions.

49. The view was expressed that the contractual link requirement could be dispensed with as long as the Secretary-General was given the authority to certify that the non-governmental organization was working alongside the United Nations and in accordance with its mandate.

50. A number of delegations considered that it was essential for humanitarian non-governmental organizations working alongside the United Nations to have a contractual link with the United Nations, and would not support dispensing with such a requirement. In the opinion of some delegations, the lack of such a contractual link could risk undermining the protection given under the 1994 Convention.

51. The view was also expressed that the lack of a clear contractual link might act as a disincentive to States to ratify the Convention. It was also noted that the 1994 Convention was a law enforcement convention and accordingly it was essential to identify clearly to whom it applied.

52. Some delegations made reference to the proposed text in paragraph 33 of the Secretary-General's report, which described non-governmental organizations engaged in humanitarian relief operations in "an independent, neutral, impartial and non-discriminatory manner". It was noted that such criteria were matters of fact which might be the subject of a conflict of interpretation. That would introduce uncertainties and practical problems into the regime established under the 1994 Convention. It was also noted that the contractual link gave a legal character to the participation of non-governmental organizations in the work of the United Nations.

53. The view was expressed that the contractual link requirement ensured that the non-governmental organization was adhering to the goals and principles of the United Nations, and in return the United Nations carried a responsibility to protect that non-governmental organization.

54. Several delegations suggested that a model agreement for the purposes of the application of the Convention between the United Nations and humanitarian non-governmental organizations should be elaborated. That would make it easier to conclude an agreement with such organizations in a quick and efficient manner and provide clarity as to the application, or the lack thereof, of the Convention.

55. Amendments were proposed to the definition of "associated personnel" in article 1 (b) of the Convention.[3]

Notes

[1] Further information on the Ad Hoc Committee is available at www.un.org/law/UNsafetyconvention/index.html.

[2] A proposal was made to amend the text under "(iii) Obligation to prosecute or extradite" by adding at the end of the sentence the phrase "which have their jurisdiction over the crimes set out in article [reference to (ii)]". A proposal was also made to amend the text of subsection (iii) to read:

"(iii) Establishment of jurisdiction and obligation to prosecute or extradite

1. The Government shall establish its jurisdiction over the crimes set out in article [reference to (ii)] when the crime is committed in its territory and the alleged offender is not a member of the peacekeeping operation.

2. The Government shall, if it does not extradite the alleged offender, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.

3. The foregoing is without prejudice to the Government's power, in case the alleged offender has fled from its territory, to seek his or her extradition thereto."

[3] The drafting suggestion is as follows:

"(i) Persons assigned by a Government or an intergovernmental organization, with the express or tacit consent, which may at any time be withdrawn, of the competent organ of the United Nations;

(ii) [*no change*]

(iii) Persons deployed by a humanitarian non-governmental organization with the express or tacit consent, which may at any time be withdrawn, of the Secretary-General of the United Nations, a specialized agency or the International Atomic Energy Agency,

to carry out activities in support of the fulfilment of the mandate of a United Nations operation."

Annex

[*Document A/AC.264/L.2*]